provided for by law and organized by an officer acting without authority, is a jury? One man cannot summon twelve others and, at his pleasure, constitute them a body authorized to pass judgment upon their fellows. In an exhaustive opinion in *State* v. *Doherty* (1872) 60 Me. 504, it was held that an omission by the legislature to provide for the organization of a grand jury could not be supplied or cured by the county court and that its independent efforts to impanel one were absolutely void. See *State* v. *McNamara* (1867) 3 Nev 60; *Bruner* v. *The Court*, supra. It has repeatedly been held that a pseudo jury of more or less than the prescribed number of members is no jury since such a body has not the sanction of law. *Cancemi* v. *The People* (1858) 18 N. Y. 128; *Work* v. *The State* (1853) 2 O. St. 296; *The People* v. *Thurston* (1855) 5 Cal. 69. It would seem that this precise principle is involved in the case under consideration.

POWER OF A COURT TO ACT UPON ITS OWN MOTION.—The extent to which the functions of the court are to be limited to those of an umpire between the parties is suggested by a recent Missouri decision holding that, irrespective of statute, the court, on its own motion, may set aside a verdict and order a new trial on the grounds of erroneous instruction, although no exceptions had been taken thereto. *Nulton* v. *Croskey* (1905) 85 S. W. 644.

The conception of the strict neutrality of the court seems to have been an early characteristic of the common law. The underlying idea was that the parties must learn the rules of the game at their peril and that it was their own concern if they threw away their chances. 2 Poll. & Mait. Hist. Eng. Law, 670; Pollock, 3 COL. LAW REV. 510. Such a rule carried to its logical conclusion would tend to make of the court a mere figure-head and would lead to a miscarriage of justice unless somewhat modified. Accordingly it was early decided in England that wherever one had been convicted and the time in which he might make motion had elapsed, the court might grant a new trial of its own motion where it appeared that injustice would otherwise be done. *King* v. *Gough* (1781) Douglas 791; *Rex* v. *Atkinson* (1784) 5 D. & E. 437, note. Likewise in civil cases the court might grant a new trial where the party aggrieved was disqualified to make the motion. *Birt* v. *Barlow* (1779) Douglas 170.

The decided tendency of modern English decisions is away from the umpire theory and towards the position that the judge's function is to find out the truth. To this end he may call and examine witnesses not called by either party and, without his leave, neither party has a right to cross-examine them. *Coulson* v. *Disborough* [1894] 2 Q. B 316. But the same is not true of American development. The principle followed here has been to restrict the exercise of the court's discretion lest private rights be impaired. It has been held that a judge may not set aside a verdict on his own motion unless rendered under circumstances making it legally void, such as misconduct of the jury, *Lloyd* v. *Brinck* (1871) 35 Tex. 1; nor rule out evidence which has gone to the jury without objection. *Barker* v. *Blount* (1879) 63 Ga. 423 *semble*. Even under the limitations imposed

by the umpire theory, however, the result reached in *Nulton* v. *Croskey* would seem proper. Where the court has contributed to the unlawful and unjust result under a mistaken view of the law, it is not only its right but its duty to itself, to order a new trial. *Wolmerstadt* v. *Jacobs* (1883) 61 Iowa 372. A fair umpire may not champion either side, therefore if he has prejudiced the rights of either side by active error on his part, he should be permitted to rectify such mistake. The exercise of this power is not a matter of right which a party may demand, but rests in the court's discretion. *Richmond* v. *Pogue* (1865) 36 Mo. 313. A logical extension of this principle might justify the court's acting upon its own initiative in cases where a part of the court, for instance the jury, has been guilty of error to the detriment of one of the parties, as by rendering a verdict in direct violation of proper instructions, or one clearly insufficient, or one not responsive to the issues. *Allen* v. *Wheeler* (1880) 54 Iowa 628; *R. R.* v. *Cir. Judge* (1896) 110 Mich. 173.

THE RIGHT OF A CONVICT TO CONTRACT.—A distinction was early made between the rights of one under attainder of treason or felony and one civilly dead. A person attainted was at times spoken of as "civiliter mortuus," *Bullock* v. *Dodds* (1819) 2 B. & Al. 258, but the results of such attaint were not the same as the results of civil death. The latter term was synonymous to natural death and was strictly confined to cases of persons banished, or abjured the realm, or who had entered the church. *Platner* v. *Sherwood* (N. Y. 1822) 6 Johns. Ch. 118. Certain proprietary rights were preserved to a man attainted. He did not forfeit his freehold so long as he lived until office found or entry by the king. *Doe* v. *Pritchard* (1833) 5 B. & A. 765; cf. *Avery* v. *Everett* (1888) 110 N. Y. 317. Until this entry was made, a grant by one under attainder bound all persons, but the king and the lord, of whom the lands were held. Sheppards Touchstone 231; Perkins Profitable Book 62. Likewise where the forfeiture of the estate was limited to the lifetime of the one attainted, the remainder of the estate could be devised by the felon. *Rankin's Heirs* v. *Executors* (Ky. 1828) 6 T. B. Mon. 531.

It seems perfectly clear that the rights to personal safety of the one attainted were inviolate. He was not absolutely at the disposal of the crown, for until execution, the creditors had an interest in his person for securing their debts and after pardon granted, he could bring an action for personal injuries received during imprisonment. See *Ramsay* v. *MacDonald* (1748) Foster's Crown Cases 62, note. Whether his contract rights were preserved is not so clear. It is intimated that an attainted person could make a valid contract of marriage, although perhaps unable to enforce contracts at the time. *Kynnaird* v. *Leslie* (1866) L. R. 1 C. P. 389. This question has recently been passed upon by the federal district court in Massachusetts as one of novel impression. A convict who had escaped was allowed to recover, after his subsequent recapture and service of sentence, upon his contract made during the period of his escape. *McCarron* v. *Dominion Atlantic Ry. Co.* (1905) 134 Fed. 762.